

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

JOSE PEREZ
Plaintiff,

VS.

DAVID HILL KING AND
LEE MARTIN SILVA and
NATIONWIDE MUTUAL
INSURANCE COMPANY
Defendant.

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CIVIL ACTION NO. _____

NOTICE OF REMOVAL

Defendants Nationwide Mutual Insurance Company, David Hill King and Lee Martin Silva (“Defendants”) file this Notice of Removal of the above-styled action pursuant to 28 U.S.C. §§ 1446(a) and would respectfully represent and show unto this Court the following:

A. Introduction

1. Pursuant to Local Rules 3.1 and 81.1, Defendants file their Civil Cover Sheet (Exhibit “A”).
2. On or about April 5, 2017, Plaintiff Jose Perez (“Plaintiff”) initiated the state court lawsuit against Defendants David Hill King and Lee Martin Silva in the 134th Judicial District Court of Dallas County, Texas, styled *Jose Perez v. David Hill King and Lee Martin Silva*, pending as Cause No. DC-17-04017 (“the state court action”). In the state court action, Plaintiff seeks actual damages for violations of the Texas Deceptive Trade Practices Act (“DTPA”) and violations of the Texas Insurance Code. Further, Plaintiff seeks attorneys’ fees, treble damages, exemplary damages and 18% interest. *See Plaintiff’s Original Petition*, attached hereto as Exhibit “B”.

3. Plaintiff then filed an amended petition in the state court action naming Nationwide Mutual Insurance Company as a Defendant. *See Plaintiff's First Amended Original Petition*, attached hereto as Exhibit "C".

3. The attorneys involved in the action being removed are listed as follows:

Party and Party Type

Attorney(s)

Jose Perez - Plaintiff

Mark S. Humphreys
Texas Bar No. 00789762
Mark S. Humphreys, P.C.
702 Dalworth Street
Grand Prairie, Texas 75050
Telephone (972) 263-3722
Fax (972) 237-1690

Nationwide Mutual Insurance
Company - Defendant

Randall G. Walters
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Meadow Park Tower
10440 N. Central Expy, Suite 1500
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Telephone (214) 749-4805
Facsimile: (214) 760-1670
Randy.walters@wbclawfirm.com

David Hill King - Defendant

Randall G. Walters
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Lee Martin Silva - Defendant

Randall G. Walters
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10440 N. Central Expy, Suite 1500

Dallas, TX 75231
Telephone (214) 749-4805
Facsimile: (214) 760-1670
Randy.walters@wbclawfirm.com

4. The name and address of the court from which the case is being removed is as follows:

The Honorable Dale Tillery
134th District Court
George L. Allen, Sr. Courts Building
600 Commerce Street, 6th Floor West
Dallas, Texas 75202
214.653.6995

B. Notice of Removal Timely

5. Nationwide was served with process and a copy of Plaintiff's suit on August 2, 2017. Pursuant to 28 U.S.C. § 1446(b), this Notice of Removal is filed within thirty (30) days after receipt by Defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based. Consequently, this Notice of Removal is timely.

C. Complete Diversity

6. Pursuant to the state court action, Jose Perez is a citizen of the State of Texas, located in Dallas County, Texas.
7. Defendant Nationwide Mutual Insurance Company is now, and was at all times relevant hereto, a citizen of the state of Ohio, incorporated in the state of Ohio, and having its principal place of business in the state of Ohio.
8. Defendants David Hill King and Lee Martin Silva are citizens of the State of Texas. However, Nationwide would show that Plaintiff simply filed the present case against King and Silva in a separate action and then subsequently added Nationwide to the case nearly four months later after Judge Kinkeade had already denied a motion to remand of a nearly identical case against Nationwide pending in the Northern District of Texas – Dallas Division titled *Jose*

Perez v. Nationwide Mutual Insurance Company pending in Cause No. 3:16-cv-03502-K. Plaintiff's inclusion of King and Silva in a separate state court case and his efforts to amend his petition to name Nationwide as a defendant are nothing more than an attempt to circumvent Judge Kinkeade's previous order denying Plaintiff's motion to remand/consolidate and an effort to prevent removal of the case to federal court. Defendants would show that for purposes of removal, the citizenship of King and Silva should be disregarded because they have been included in the present case solely for the purpose of defeating diversity of citizenship jurisdiction.

9. The Fifth Circuit has previously held that a removing party alleging fraudulent joinder must prove either actual fraud in the pleading of jurisdiction facts or, as is applicable in the present case, the Plaintiff's inability to establish a cause of action against the non-diverse party in state court. *Smallwood v. Illinois Cen. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004). In *United Energy Group*, the Fifth Circuit clarified *Smallwood* by emphasizing that the federal/*Twombly* pleading standard should apply to this analysis. *Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 208 (5th Cir. 2016). In fact, the Northern District of Texas has previously denied motions to remand when insurance agents were added to negligent misrepresentation and DTPA suits by way of fraudulent joinder. *Davis v. State Farm Lloyds*, 2015 U.S. Dist. LEXIS 95086 (N.D. Tex. 2015).

10. Texas law is well settled that, "in most circumstances, an insured may not prevail on a bad faith claim without first showing that the insurer breached the contract." *Liberty Nat. Fire. Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996); *See Progressive County Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 921 (Tex.2005) (per curiam) (An extra-contractual claim cannot survive resolution of coverage in favor of the insurer). In the present case, Plaintiff chose not to assert a

breach of contract claim against any Defendant in this case. Although Plaintiff asserted a number of causes of action relating to extra-contractual bad faith by Nationwide, the Texas Supreme Court has consistently held that breach of contract and breach of warranty/bad faith are separate causes of action and must be plead separately in order for both to be decided by the trier of fact. *Southwestern Bell. Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991). Because Plaintiff's pleadings fail to include a breach of contract claim, the issue of whether Nationwide breached a contract of insurance with Plaintiff will not be considered by the jury.

11. As shown above, Plaintiff declined to assert a breach of contract claim against Nationwide. Because the jury will not return a verdict relating to breach of contract by Nationwide, Plaintiff is precluded from recovering damages for extra-contractual violations by Nationwide, King, or Silva or even submitting questions on such issues to the jury. *See Akin*, 927 S.W.2d at 629 (Tex. 1996). As currently plead, Plaintiff's Amended Petition does not allege facts or any valid causes of action which would support recovery by Plaintiff against King or Silva. Plaintiff's inclusion of King and Silva in this case amounts to fraudulent joinder, and their citizenship should not be considered by this Court in determining whether diversity of citizenship exists for purpose of removal.

12. In light of the foregoing, the parties are of completely diverse citizenship. *See* 28 U.S.C. §§ 1332(a), 1441(b).

13. Plaintiff's First Amended Petition alleges actual damages, seeks three times the amount of actual damages, and seeks attorneys' fees, interest and exemplary damages. Exhibit "C" at 48-49, 54-55. Specifically, Plaintiff seeks an amount over \$100,000.00 but less than \$200,000.00. *Id.*

14. In determining the amount in controversy, the court may consider “policy limits ... penalties, statutory damages, and punitive damages.” *St. Paul Reinsurance Co., Ltd. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998); *see Ray v. State Farm Lloyds*, No. CIV.A.3:98-CV-1288-G, 1999 WL 151667, at *2-*3 (N.D. Tex. Mar. 10, 1999) (finding a sufficient amount in controversy in plaintiff’s case against their insurance company for breach of contract, fraud, negligence, gross negligence, bad faith, violations of the Texas Insurance Code, violations of the Texas Deceptive Trade Practices Act, and mental anguish); *Fairmont Travel, Inc. v. George S. May Int’l Co., et al.*, 75 F.Supp.2d 666, 668 (S.D. Tex. 1999) (considering DTPA claims and the potential for recovery of punitive damages for the amount in controversy determination); *Chittick v. Farmers Ins. Exchange*, 844 F.Supp. 1153, 1155 (S.D. Tex. 1994) (finding a sufficient amount in controversy after considering the nature of the claims, the types of damages sought, and the presumed net worth of the defendant in a claim brought by the insureds against their insurance company for actual and punitive damages arising from a claim they made for roof damages).

15. Plaintiff’s claims are centered on Nationwide’s alleged failure to pay the proceeds of Plaintiff’s policy for damages to Plaintiff’s vehicle. Plaintiff, as stated in his Original Petition, seek damages for breach of contract, violations of the Texas Insurance Code, as well as pre-judgment interest, post-judgment interest, court costs, attorneys’ fees and penalties, including statutory treble damages and exemplary damages.

16. A court can determine that removal is proper from a plaintiff’s pleadings if plaintiff’s claims are those that are likely to exceed the jurisdictional amount. *See Allen v. R&H Oil & Gas., Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995); *De Aguilar v. Boeing Co.*, 11 F.3d 55, 57 (5th Cir. 1993). Only “expenses and costs” are excluded from the calculation of the matter in controversy. 28 U.S.C. § 1332(a). Attorney’s fees are an element of the amount in controversy where their

recovery is authorized by a statute under which the plaintiff sues. *H&D Tire & Auto. Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 330 (5th Cir. 2000), cert. denied, 534 U.S. 894 (2001).

17. Plaintiff even specifically stated in his Amended Petition that he seeks monetary relief of over \$100,000 but less than \$200,000.00. Exhibit “C”. Therefore, the amount in controversy in this case exceeds the jurisdictional requirements. *Id.*

D. All Pleadings of State Court Action Attached As Exhibits

18. Copies of all pleadings, process, orders, and other filings in the state court action are attached to this notice as required by 28 U.S.C. § 1446(a). *See* Exhibit “D”.

E. Basis for Removal

19. Because this is a civil action of which the District Courts of the United States have original jurisdiction, this case may be removed by this Court pursuant to 28 U.S.C. § 1446(b). Further, because Plaintiff is a citizen and resident of Texas, Defendant Nationwide is a citizen of Ohio, and the citizenship of Defendants King and Silva should be disregarded for jurisdictional purposes, and the amount in controversy exceeds \$75,000, the Court has subject matter jurisdiction based on diversity of citizenship and residency. 28 U.S.C. § 1132. As such, this removal action is proper.

F. Venue

20. Venue is proper in this district under 28 U.S.C. §1441(a) because this district and division embrace the place where the removed action has been pending.

G. Filing of Notice with State Court

21. Promptly after filing this Notice of Removal, Notice will give written notice of the removal to Plaintiff through his attorney of record and to the clerk of the state court.

H. Defendant's Demand for Jury Trial

22. Defendants King and Silva demanded a jury trial in their original answer. Nationwide also asserts its rights under the Seventh Amendment to the U.S. Constitution and demands, in accordance with Federal Rule of Civil Procedure 38, a trial by jury on all issues.

PRAYER

23. WHEREFORE, PREMISES CONSIDERED, Defendants Nationwide Mutual Insurance Company, David Hill King, and Lee Martin Silva request that this Court proceed with the handling of this cause as if it had been originally filed herein, that this Court make such orders, if any, and take such action, if any, as may be necessary in connection with the removal of the state court action to this Court, and that they have such other and further relief to which they may show themselves entitled.

Respectfully submitted,

WALTERS, BALIDO & CRAIN, L.L.P.

BY: /s/ Randall G. Walters
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214/749-4805 - MAIN
Email: randy.walters@wbclawfirm.com
ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of August, 2017, a true and correct copy of the above and foregoing was forwarded to all counsel of record in accordance with the Federal Rules of Civil Procedure.

/s/ Randall G. Walters
RANDALL G. WALTERS

EXHIBIT A

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Jose Perez

DEFENDANTS

David Hill King, Lee Martin Silva, Nationwide Mutual Insurance Company

(b) County of Residence of First Listed Plaintiff Dallas

(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant Dallas

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, and Telephone Number)

Mark S. Humphreys

Mark S. Humphreys, P.C. 702 Dalworth Street Grand Prairie, Texas 75050

Attorneys (If Known)

Randall G. Walters

Walters Balido & Crain, LLP 10440 N. Central Expy, Suite 1500

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☐ 3 Federal Question (U.S. Government Not a Party)
☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input checked="" type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☐ 1 Original Proceeding
☒ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from Another District (specify)
☐ 6 Multidistrict Litigation - Transfer
☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S. Code § 1332

Brief description of cause:

Bad-faith insurance dispute

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE Ed Kinkeade

DOCKET NUMBER 3:16-cv-03502-k

DATE

08/15/2017

SIGNATURE OF ATTORNEY OF RECORD

/s/Randall G. Walters

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____